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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

MARGARET COWDERY, Plaintiff and Appellant, v. OLD MUTUAL FINANCIAL LIFE INSURANCE COMPANY, Defendant and Respondent.	D075076 (Super. Ct. No. PSC1504914)

APPEAL from a judgment of the Superior Court of Riverside County, James T. Latting, Judge. Affirmed.

Shernoff Bidart Echeverria and William M. Shernoff, Howard S. Shernoff, Samuel L. Bruchey, Travis M. Corby for Plaintiff and Appellant.

Freeman Mathis & Gary and Chad Ervin Weaver, Margot Marie Fourqurean for Defendant and Respondent.

Margaret Cowdery[1] appeals a summary judgment in favor of Old Mutual Financial Life Insurance Company (Old Mutual). She contends the court erroneously concluded the statutes of limitation had run on all her claims for fraud, conspiracy to defraud, and financial abuse of an elder.[2] She claims she could not have discovered Old Mutual's assertedly fraudulent scheme earlier, in part because she had a fiduciary relationship with one of the scheme's participants. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The October 2015 Complaint for Fraud, Conspiracy to Defraud and Financial Abuse of an Elder

Cowdery alleged she was a U.S. Army veteran who turned 94 years old in 2010, and lived at an assisted-living facility in Palm Desert, California. Her predeceased husband was also a veteran; he "handled their finances, and left her with a variety of retirement accounts that provided her a comfortable living." Cowdery claimed to be "generally unsophisticated financially." In the summer of 2010, Mike Read, an insurance agent, discussed with the residents of Cowdery's facility a Department of Veterans

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1 Although Cowdery died during the pendency of this appeal, to avoid confusion, we still refer to her as the appellant. We grant the motion of Cowdery's niece, Deborah Pack-Garcia, successor in interest, to substitute into this case as an appellant.

2 We grant Cowdery's unopposed motion for judicial notice of documents regarding the settlement of companion cases involving the other defendants, who were National Western Life Insurance Company; James DeVine and his company, JLD, Inc.; Mike Read and his company, Read Capital Management & Insurance Services, LLC; and Pro-Elite Senior Services. (Evid. Code, §§ 451, 459.)

Affairs (VA) administered pension program, called the Veterans Aid and Attendance (VAA), which pays monthly benefits to qualifying low-income war time veterans and their surviving spouses and dependent children.

Cowdery alleged in the complaint: "DeVine and Read misrepresented that they were qualified and accredited to obtain VAA benefits for Mrs. Cowdery and further misrepresented that they were providing services to her in connection with obtaining VAA free of charge. DeVine, JLD, Inc. and Read earned commissions on the sale of each annuity. Indeed, DeVine and Read intended for [] Cowdery to rely on their misrepresentations so that they could sell the annuities and earn the commissions. [¶] [] Cowdery reasonably relied on their misrepresentations. DeVine and Read presented themselves as affiliated with, or an expert on, VA benefits programs. They showed [] Cowdery a picture-badge that identified him [*sic*] as a "Volunteer Veteran Advocate" with Pro-Elite." Cowdery contacted Read's employer, Pro-Elite, and was assigned to work with James DeVine. Cowdery alleged, "DeVine also owned and operated JLD, Inc., an independent marketing organization. Devine, Read, and JLD, Inc. were all licensed to sell insurance products, including annuities, for National Western and Old Mutual."

The complaint alleges: "At all relevant times DeVine, Read, Read Capital, Pro-Elite and JLD, Inc. were the agents of National Western and Old Mutual acting with the knowledge, authorization and ratification of National Western and Old Mutual such that the acts of DeVine, Read, Read Capital, Pro-Elite and JLD, Inc. can be imputed to

National Western and Old Mutual and the knowledge of DeVine, Read, Read Capital, Pro-Elite and JLD, Inc. can be imputed to National Western and Old Mutual."

Cowdery alleged the VAA is a means-tested program generally available for claimants with assets worth less than $80,000. The VA permits claimants to transfer assets to certain third persons, trusts or other entities to meet the income threshold before applying for benefits. However, the VA may deny benefits to any applicant who transferred assets to a trust to manipulate his or her net worth, or if the claimant still retains sufficient control over the transferred assets. The VA accredits certain individuals to assist applicants for VAA benefits, and prohibits those assistants from charging a fee for their services.

Cowdery alleged DeVine established Pro-Elite as a sham Veterans Service Organization as part of a scheme to defraud elderly veterans, and Pro-Elite, DeVine, and Read were not accredited by the VA to advise individuals in obtaining VAA benefits. In July 2010, DeVine and Read, with Cowdery's knowledge and consent used $50,000 of Cowdery's assets to purchase for her a "Single Premium Immediate Annuity" (SPIA) issued by Old Mutual. Under the SPIA, Cowdery received monthly payments of $1,180 for three years and seven months.

Separately, DeVine advised Cowdery to create an irrevocable trust in order to qualify for VAA benefits by reducing the amount of her assets. DeVine and Read introduced Cowdery to an attorney, Stuart Furman, who helped her by disbursing her retirement savings that were worth approximately $550,000. Attorney Furman drafted an irrevocable trust, under which Cowdery was required to purchase from National Western

five deferred equity annuities in the amount of $75,000 each. The trust named Pack-Garcia, Cowdery's niece, as trustee and Cowdery's five nieces and nephews as beneficiaries.[3] Cowdery alleged that "DeVine and Read submitted an application on [her] behalf for the VAA benefits. Taking advantage of the no-look back period, [they] reported that [she] had an income of less than $20,000 [*sic*] and total assets of less than $80,000." The VA approved her application for VAA benefits, under which she received a monthly pension of $1,644, which was later increased to $1,758. By October 2016, Cowdery had received a total of $125,766 in VAA benefits.

Cowdery alleged she first discovered DeVine's and Read's misconduct in May 2014, when she received a letter from the VA accusing her of underreporting her 2010 income to receive the VAA benefit. After attorney Furman responded to the VA on Cowdery's behalf, it "relented, and agreed to continue paying [] Cowdery her monthly pension benefits." Cowdery alleged that all defendants committed elder abuse by transferring and subsequently retaining her money in annuities that were locked in at an interest rate of .016, which was far below market levels.

The gravamen of Cowdery's fraud cause of action is that she suffered harm "by the scheme perpetrated on her by defendants in that she purchased annuities that were

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[3] Cowdery explains in her appellate brief that these annuities are not properly the subject of this appeal; but are related to the companion cases: "These five annuity purchases, which totaled $400,000 and resulted in [Cowdery] losing access to most of her money, as well as the dissolution of [her] existing trust and formation of a new irrevocable trust, were the subject of separate summary judgment motions and a related appeal, since settled." She asserts, however, that while these background facts do not pertain to Old Mutual directly because no trust was involved with the [Old Mutual] transaction, they "comprise an integral part of the overall alleged scheme."

inappropriate and unsuitable for her, which deprived her of interest earnings and rendered her net worth inaccessible. . . . Old Mutual received substantial funds paid in connection with [her] purchase of the annuities."

The gravamen of Cowdery's claims of conspiracy to defraud cause of action is that "Defendants entered into an agreement whereby DeVine and Read, deploying their affiliation with Pro-Elite to gain credibility and create the illusion of a connection with the government, the military or the VA, would target residents of assisted-living facilities for the sale of National Western and Old Mutual annuities."

The gravamen of the financial abuse of elder cause of action is that Cowdery suffered emotional and monetary harm because defendants transferred "her assets into an irrevocable trust and purchas[ed] unsuitable deferred annuities under the pretense of qualifying her for VAA benefits. . . . DeVine and Read represented that these free services were made possible by funding from insurers like National Western and Old Mutual."

Summary Judgment Motion

Old Mutual argued in its summary judgment motion that no facts supported Cowdery's causes of action. It also argued they were time-barred, as a three-year statute of limitation applied to Cowdery's fraud and conspiracy to defraud claims (Code Civ. Proc.,[4] § 338, subd. (d)), and a four-year statute of limitation applied to her financial elder abuse cause of action (Welf. & Inst. Code, § 15657.7).

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4 Undesignated statutory references are to the Code of Civil Procedure.

Old Mutual adduced evidence that DeVine was an independent agent for Old Mutual and an agent for more than thirty other insurance companies. It is undisputed that DeVine was appointed as an insurance agent by numerous life insurers, as listed in his Department of Insurance individual license details. Jo Ann Grant, a vice president at Old Mutual's successor company, explained Old Mutual's appointment of independent insurance sales agents and the issuance of annuity products, including the SPIA. She stated Old Mutual does not market its product to the public. Rather, its authorized agents can select its products for sale to their customers. Therefore, Old Mutual does not interact with the purchaser until after the customer has signed the application. DeVine has been an Old Mutual independent agent since 2002, but "Old Mutual has never had any connection to or involvement with Devine's company, Pro-Elite Senior services, or its representative, Mike Read." After DeVine submitted Cowdery's application for purchase of a SPIA, Old Mutual processed the application and issued the annuity to Cowdery. Grant declared that "No agreement exists or has ever existed between Old Mutual and any other named Defendants or any other person for the purpose of targeting customers of any kind for the sale of Old Mutual annuities, including the SPIA."

Old Mutual pointed out it was undisputed that in June 2010, after Cowdery and Pack-Garcia held discussions with DeVine and Read, Cowdery signed several documents relating to her SPIA purchase, including a check on which she wrote the word "annuity" in the memorandum line. Furthermore, it is undisputed that in 2010, attorney Furman,

DeVine, Pack-Garcia, and Rick Buckman, a licensed Veterans Service Officer (VSO), assisted Cowdery in applying for VAA benefits.

The additional help Cowdery received in qualifying for the VAA benefit is further explained in the court's ruling in one of the companion cases: "At the June 4, 2010 meeting, DeVine recommended Cowdery see Attorney Stuart Furman. . . . DeVine referred her to [Furman]. Furman is an accredited attorney on the preparation, presenting and prosecution of claims for VA benefits. . . . Cowdery signed a retainer agreement with Furman for the preparation of The Cowdery Irrevocable Trust. . . . Furman prepared the trust and related documents including a [p]ower of [a]ttorney, which were executed on July 2, 2010. . . . Pack-Garcia was named as the Trustee and given durable power of attorney, to which Pack-Garcia consented."

Old Mutual argued, "All of the facts relevant to [Cowdery's] Old Mutual SPIA purchase were disclosed in the account application, disclosure forms, and annuity contract . . . all of which [she] completed, signed, and/or initialed no later than August 2010. There are no facts indicating that [she] discovered anything new or different about her Old Mutual SPIA at any time after August 2010." It is undisputed Cowdery received the agreed upon monthly payments under both the SPIA and the VAA program.

Cowdery's Opposition to the Motion

In opposing the motion, Cowdery admitted she had signed or initialed several documents explaining the SPIA's terms, and acknowledging her consent to purchasing the SPIA. One multi-page document stated in bold letters on each page: "California's Senior Protection in Annuity Transactions ACT (SB 620)," and included a notice in bold

type and capital letters: "Important [¶] You have purchased a life insurance policy or annuity contract. Carefully review it for limitations. [¶] This policy may be returned within 30 days from the date you received it for a full refund by returning it to the insurance company or agent who sold you this policy. After 30 days, cancellation may result in a substantial penalty known as a surrender charge." Cowdery admitted she paid for the SPIA in part with a check on which she wrote the word "annuity." Nonetheless, she claimed not to recall filling out the purchase application for that annuity, reading the related documents, or signing them. Cowdery submitted a copy of her 2016 deposition testimony, in which she stated that she merely followed DeVine or Read's instructions to sign the different documents.

Cowdery contended she had no way of knowing "Old Mutual was improperly targeting seniors for the sale of unsuitable and abusive annuities. The VA benefit was only intended for financially disadvantaged wartime veterans and has certain asset limitations, but Old Mutual specifically designed and marketed a product, the [SPIA] as a 'tool' that would 'spend down' a senior's assets so that they could qualify for the VA benefit." . . . The [SPIA] is illiquid and has an abusive interest rate on it—0.16 [percent]—which is not disclosed anywhere on the annuity application, the marketing material, the policy certificate, the quote or illustration, nor the certificate information page." Cowdery claimed she did not discover Old Mutual's fraudulent conduct until February 2015, when she read a newspaper article alleging Read "swindled an elderly woman into creating an irrevocable trust and purchasing unsuitable and unnecessary annuities in order to qualify for the [VAA] pension." The article stated Read had bought

the annuities from Elco Mutual Life and Annuity. It does not mention Old Mutual or DeVine.

Cowdery also argued that she and DeVine had a fiduciary relationship: "[Cowdery], who trusted that DeVine would act in her best interest, gave [him] access to her apartment and permitted him to search through her files and records for financial documents, including her tax returns. . . . Equipped with [her] private financial information and the knowledge of her specific financial concerns, DeVine created a multi-faceted plan to help her acquire VA benefits." She added, "Because [she] reposed her trust in DeVine—who held himself out as a financial advisor who would act in her best interest—she signed all of the documentation thinking that it was only for getting the VA benefit, [and] she never knew that he was selling her an annuity."

The Court's Ruling

The court addressed only the statute of limitation issue, ruling that the statutes had run on all of Cowdery's causes of action: "[I]t is clear from the undisputed material facts that in the exercise of reasonable diligence Cowdery could have discovered 1) that the trust was irrevocable and the assets beyond her reach, as well as 2) that she was not required to purchase annuities to qualify for VA benefits. Even if true, the fact that Cowdery and/or her attorney-in-fact (Pack-Garcia) failed to read the documents she signed, or failed to understand those documents, does not support a finding of delayed discovery for purposes of tolling the statute of limitations even if she in fact did not actually become aware of any misrepresentations until she read the newspaper article or received an investigation notice by the VA. . . . Here, Cowdery presents no evidence

from which a finder of fact could find that she did not have the ability, with reasonable diligence, to have discovered that the VA benefits were a pretext to sell her annuities long before 2015."

DISCUSSION

I. *Applicable Law and Standard of Review*

Summary judgment is proper when it appears no triable issues of material fact exist and judgment is warranted as a matter of law. (§ 437c, subd. (c); *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) As the moving party, the defendant must show "one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (§ 437c, subd. (p)(2); *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).) The moving defendant "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [the defendant] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Aguilar, supra,* at p. 850.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid.*; see also *Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 162-163 [plaintiff opposing summary judgment must produce "substantial responsive evidence" sufficient to establish a triable issue of material fact].)

On appeal, we "independently examine[ ] the record and consider[ ] all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained." (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) We view the evidence and all inferences "reasonably drawn therefrom" in favor of the party opposing summary judgment. (*Aguilar, supra,* 25 Cal.4th at p. 843; see also *Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh* (2016) 6 Cal.App.5th 443, 459 [speculation is different from an inference and cannot be used to defeat a motion for summary judgment].) " 'We liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Hampton v. City of San Diego* (2015) 62 Cal.4th 340, 347.) " 'We are not bound by the trial court's stated reasons or rationales.' " (*Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 436.) " 'In practical effect, we assume the role of a trial court.' " (*Ibid.*)

"Civil actions are governed by statutes of limitations that dictate the time period within which a cause of action may be commenced." (*Thomson v. Canyon* (2011) 198 Cal.App.4th 594, 604.) Ordinarily, the statute of limitations "begins to run upon the occurrence of the last element essential to the cause of action. The plaintiff's ignorance of the cause of action, or of the identity of the wrongdoer, does not toll the statute." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 187.) "The general rule for defining the accrual of a cause of action sets the date as the time 'when under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises . . . ." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.)

Under the discovery rule, "the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110.) "A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Id.* at p. 1111.)

The discovery rule generally applies in two situations: (1) when the breach or the resulting injury is of such a nature that it will ordinarily be difficult for the plaintiff to immediately detect or comprehend, either because it is physically hidden (such as a subterranean trespass or a foreign object left in the body after surgery) or because it is "beyond what the plaintiff could reasonably be expected to comprehend" (such as professional negligence, when it is beyond a layperson's ability to detect or recognize a breach of the professional's standard of care); or (2) when there is a confidential or fiduciary relationship between the parties, and "application of the discovery rule 'prevents the fiduciary from obtaining immunity for an initial breach of duty by a subsequent breach of the obligation of disclosure.' " (*Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1614-1615.) "Where the facts adequately allege breach of fiduciary duty or undue influence, the courts will allow a date-of-discovery rule to be applied, ' "when strict adherence to the date of injury rule would result in unfairness to the plaintiff and would encourage wrongdoers to mislead their fiduciary to delay bringing suit. It is particularly appropriate when the defendant maintains custody and control of a plaintiff's property or

interests." ' " (*Estate of Young* (2008) 160 Cal.App.4th 62, 77.) The doctrine "focuses primarily on *the plaintiff's* excusable ignorance of the limitations period. [It] is not available to avoid the consequences of one's own negligence." (*Lehman v. U.S.* (9th Cir.1988) 154 F.3d 1010, 1016.)

Section 338, subdivision (d) sets a three-year statute of limitation for fraud causes of action. The statute of limitations on a financial elder abuse cause of action expressly runs from the time "the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered, the facts constituting the financial abuse." (Welf. & Inst. Code, § 15657.7.) " 'Financial abuse' of an elder or dependent adult occurs when a person or entity . . . [t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both." (Welf. & Inst. Code, § 15610.30, subd. (a).) A wrongful use includes situations in which "the person or entity knew or should have known that [their] conduct is likely to be harmful to the elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subd. (b).) The wrongful taking may occur "by means of an agreement." (Welf. & Inst. Code, § 15610.30, subd. (c).)

In delayed discovery cases, "whether the plaintiff exercised reasonable diligence is a question of fact for the court or jury to decide. The drastic remedy of summary judgment may not be granted unless reasonable minds can draw only one conclusion from the evidence." (*Enfield v. Hunt* (1979) 91 Cal.App.3d 417, 419-420.)

Cowdery argues she could not have discovered Old Mutual's fraudulent actions earlier than 2015 when she read about it in the newspaper, because it involved a

sophisticated scheme. She argues in reply that "[w]hether it was the letter in July 2014 (pleaded in the complaint) or the newspaper article in February 2015 (submitted in opposition to summary judgment), or a combination of both that roused [her] suspicion, both events fall within the permissible period of delayed discovery."[5] She points out that this case involves a SPIA, which her niece was not involved in buying. Cowdery also contends that even if she had investigated the SPIA purchase during the limitations period, she could not have discovered the "pension poaching scam" because "Old Mutual engineered a fraudulent scheme by tailoring a special annuity to the requirements of the [VAA] benefit and then training and incentivizing its agents to sell it to vulnerable seniors who should neither be buying the annuity nor applying for [VAA]." She therefore argues that the gravamen of her complaint is that Old Mutual used "the [VAA] benefit as a pretext for selling her a useless and unsuitable annuity regardless of whether the annuity itself is deemed fraudulent."

Cowdery also argues, "DeVine did not identify himself [to her] as an Old Mutual insurance agent. . . . And Pro-Elite, the company that he claimed to work for, actually was an insurance agency, a fact that DeVine also concealed. . . . Since an intricate part of the pension poaching scam consisted of the sale of an insurance product, [Cowdery] who was financially unsophisticated, could not have reasonably detected the sale of an unsuitable insurance product or of any insurance product. . . . [¶] From such evidence the trier of fact could conclude that [Cowdery] did not have the ability to discover the

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[5] We reiterate that the complaint actually states Cowdery had also received a letter from the VA in May 2014.

scheme based solely on an investigation of the annuity itself. Indeed[,] from such evidence the trier of fact could find that [Cowdery] lacked the knowledge that she had purchased an annuity at all, let alone one that required her personal investigation of its propriety."

We disagree. The fact Cowdery wrote the check to Old Mutual and wrote the word "annuity" in the memo space on the check she used to buy the SPIA is direct evidence she knew what she was purchasing. Further, as Cowdery concedes, the facts of this case cannot be viewed in isolation from those of the companion cases, as they all were part of a single plan to reduce her assets to qualify her for VAA benefits, including through the purchase of other annuities. No evidence indicates Cowdery took the extraordinary step of disbursing her assets, worth approximately $550,000, including by buying the SPIA, without her understanding that the purpose of doing so was to qualify for VAA benefits. In fact, she did qualify and received a monthly pension. She also received monthly disbursements on her annuity. Cowdery's age, by itself, did not excuse her duty of inquiry. In fact, she consulted with her trustee, Pack-Garcia, attorney Furman, and a VSO agent upon purchasing the other annuities. Therefore, it is reasonable to conclude that, with reasonable diligence, Cowdery also could have sought their advice regarding whether to purchase the SPIA, particularly because one document Cowdery signed before purchasing it specifically warned her about financial elder abuse. Cowdery also could have consulted attorney Furman and the VSO to find out more about DeVine and his relationship with Old Mutual. It does not appear that Cowdery needed to

conduct any investigation to learn that she did not need to buy the SPIA to qualify for the VAA. She could have elected to disburse her funds in numerous other ways.

Based on the above, we conclude that because Cowdery purchased the annuity in 2010, the longer of the two statutes of limitations period applicable here was for four years, and it ran in 2014. Cowdery's complaint filed in 2015 was therefore untimely. We point out Cowdery alleges in her complaint that in May 2014, the VA raised questions about whether she properly qualified for the VAA. That VA inquiry sufficed to put her on notice of possible wrongdoing. If she had acted on that information, she still had time to file her complaint before the statute ran on her elder abuse cause of action. As stated, with reasonable diligence, around the time she purchased the annuity, or within the statute of limitation for elder financial abuse, Cowdery could have discovered the relevant information to timely initiate this lawsuit. Finally, we conclude that the newspaper article Cowdery claims gave her notice of the alleged fraud does not involve Devine or Old Mutual.

An alternative ground for affirming the grant of summary judgment is that although Cowdery's complaint allegations and summary judgment arguments largely focus on DeVine's purported misconduct, she has failed to meet her summary judgment burden of showing that a triable issue of material fact exists regarding Old Mutual's involvement with DeVine, such that his wrongdoing could be imputed to Old Mutual. Grant stated in her declaration that Old Mutual never had any connection or involvement with Devine's company or Read. Moreover, Grant declared "Other than the annual statements, opening contract forms and SPIA contract issued to Cowdery, Old Mutual

records confirm that there were no communications between Old Mutual and Cowdery at any time."[6] In short, the undisputed evidence showed DeVine was an independent agent of Old Mutual's and also was an agent for over 30 other companies. "If an insurance agent is the agent for several companies, and either selects the company with which to place the insurance or picks an insurer at the insured's direction, the insurance agent is the agent of the insured, not the insurer." (*Mercury Ins. Co. v. Pearson* (2008) 169 Cal.App.4th 1064, 1073; *Eddy v Sharp* (1988) 199 Cal.App.3d 858, 865. [same].) Therefore, Cowdery's "mere allegation" of agency is insufficient because any alleged fraud by the agent is committed in the agent's capacity as an agent for the insured. (*Mercury Ins. Co.*, at p. 1073.)

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6 We also point out that Cowdery's counsel conceded this point during oral argument. The court asked him, "Who made the decision to buy the Old Mutual annuity? Mr. DeVine? Mrs. Cowdery? Who?" Counsel answered, "Well, Mr. DeVine decides [*sic*] where to place it, yes."

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.